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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

OSCAR OLIVAS,

**Plaintiff.**

VS.

CASE NO. 14cv1434-WQH-  
BLM

BILLY WHITFORD, Port Director of Calexico West Port of Entry, Customs and Border Protection; PETE FLORES, Director of Field Operations, San Diego Field Office, Customs and Border Protection; R. GIL KERLIKOWSKE, Commissioner of Customs and Border Protection; JEH JOHNSON, Secretary of Homeland Security; JOHN KERRY, Secretary of State.

## Defendants.

HAYES, Judge:

The matters before the Court are Defendants' Motion to Dismiss Complaint and Drop Parties (ECF No. 22) and Defendants' Supplemental Motion to Dismiss (ECF No. 48).

## BACKGROUND

On June 12, 2014, Plaintiff Oscar Olivas initiated this action by filing the Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief against

1 Defendants Pete Flores, Director of Field Operations for U.S. Customs and Border  
 2 Protection's ("CBP") San Diego Field Office; Jeh Johnson, Secretary of Homeland  
 3 Security; R. Gil Kerlikowske, Commissioner of CBP; John Kerry, U.S. Secretary of  
 4 State; and Billy Whitford, Port Director of the Calexico West Port of Entry for CBP.  
 5 (ECF No. 1).

6 On August 11, 2014, the Court issued an Order denying Defendants' request that  
 7 the Petition for Writ of Habeas Corpus be dismissed for failure to name the proper  
 8 respondent. (ECF No. 20). The Court found that the Petition for Writ of Habeas  
 9 Corpus "adequately allege[d] a colorable claim of citizenship, and subject-matter  
 10 jurisdiction exists in this Court." (ECF No. 20).

11 On August 12, 2014, Defendants filed the Motion to Dismiss Complaint and  
 12 Drop Parties pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 21. (ECF No. 22).

13 On August 14, 2014, the Court issued an Amended Order referring the matter to  
 14 the Magistrate Judge for expedited discovery. (ECF No. 23).

15 On November 5, 2014, Defendants filed the Supplemental Motion to Dismiss  
 16 pursuant to Federal Rule of Civil Procedure 12(b)(1), Federal Rule of Civil Procedure  
 17 12(b)(3), and Federal Rule of Civil Procedure 21. (ECF No. 48).

### 18 **ALLEGATIONS OF COMPLAINT**

19 "[Plaintiff's] mother, Delia Perez ("Perez"), a Mexican national living in the  
 20 United States, was unwed and without lawful immigration status in 1969." (ECF No.  
 21 1 ¶ 13). "[Plaintiff] was born in El Monte in Los Angeles County, California on August  
 22 10, 1969." *Id.* "Because of her immigration status in 1969, [Perez] was fearful of  
 23 giving birth in a hospital...." *Id.* "[Plaintiff] was issued a 'delayed registration of birth'  
 24 certificate on January 19, 1970, five months after his birth." *Id.*

25 In February of 2009, Plaintiff began applying for an immigrant visa for his wife,  
 26 Claudia Hernandez ("Hernandez"), and step-son, both of whom are Mexican nationals.  
 27 *Id.* ¶ 16. The process of obtaining such a visa for a Mexican national requires  
 28 processing at the U.S. Consulate in Mexico. *Id.* On November 4, 2010, Hernandez

1 went to the U.S. Consulate in Ciudad Juárez for an interview as a part of her immigrant  
 2 visa application process. *Id.* ¶ 17. At the interview, Hernandez was told that a consular  
 3 official would need to interview [Plaintiff's] mother, Ms. Perez. *Id.*

4 On December 17, 2010, Ms. Perez traveled to the U.S. Consulate in  
 5 Ciudad Juárez, expecting to participate in a brief and non-adversarial  
 6 interview. Instead, three officials escorted Ms. Perez to a room with a  
 7 one-way glass window. A female official confronted Ms. Perez with  
 8 [Plaintiff's] birth certificate and told her that she believed the birth  
 9 certificate had been fraudulently obtained. Ms. Perez responded that  
 10 [Plaintiff] ... had been issued a delayed birth certificate because he had not  
 11 been born in a hospital. The female official ... threatened that Ms. Perez  
 12 would lose her citizenship and ... would be prosecuted for fraudulently  
 13 obtaining a birth certificate unless Ms. Perez admitted that [Plaintiff] was  
 14 born in Mexico. The female official told Ms. Perez that if she would agree  
 15 to sign a declaration indicating that [Plaintiff] was born in Mexico, Ms.  
 16 Perez would be permitted to keep her citizenship status and [Plaintiff]  
 17 would be allowed to adjust the immigration status of his wife. Ms. Perez  
 18 protested that she could not sign such a declaration because it would not  
 19 reflect the truth....

20 *Id.* ¶ 18.

21 The consular officials detained Ms. Perez in the room without access to the  
 22 outside world for around three hours. Ms. Perez reasonably felt desperate  
 23 and intimidated. She did not know when the 'interview' would end and  
 24 reasonably felt that the consular officials planned to detain her until she  
 25 agreed to sign the declaration. Eventually, Ms. Perez succumbed to  
 26 pressure and intimidation exerted by the officials and told them that she  
 27 would sign whatever they wanted her to sign. An official presented her  
 28 with a statement and instructed her to sign her name. It appears that the  
 same Department of State officer who exacted the "confession" from Ms.  
 Perez later used this statement to amend [Plaintiff's] birth certificate on  
 record with the State of California, without providing him any notice or  
 opportunity to object.

20 *Id.* ¶ 19.

21 In early 2011, Plaintiff moved to Los Angeles for work while his family stayed  
 22 in Mexicali, waiting for a determination on Hernandez's immigrant visa application.  
 23 Plaintiff traveled between the United States and Mexico almost every week, using his  
 24 birth certificate, Social Security card, and California driver's license to enter the United  
 25 States. *Id.* ¶ 21.

26 On August 22, 2011, Plaintiff attempted to return to the United States at the  
 27 Calexico West Port of Entry. CBP officers detained Plaintiff overnight and questioned  
 28 him about his birth certificate, California driver's license, and Social Security card.

1 Plaintiff informed the officers that he is a U.S. citizen who was born and raised in the  
 2 United States and had lived in the country for decades. Plaintiff explained that his  
 3 mother had given a coerced confession at the U.S. Consulate in Ciudad Juárez. A CBP  
 4 officer contacted Ms. Perez who confirmed Plaintiff's explanation of what had occurred  
 5 at the consulate. The CBP officer told Plaintiff that he could see an Immigration Judge  
 6 within a matter of hours or would have to wait "a month or two." *Id.* ¶ 22. Plaintiff  
 7 told the officer that he would prefer to see a judge in a month because he would like  
 8 some time to collect evidence of his citizenship. The officer assured Plaintiff that he  
 9 would have a hearing on his citizenship claim soon. Plaintiff relied on the officer's  
 10 assurance of a prompt hearing in deciding not to see an Immigration Judge that day. *Id.*

11 On August 23, 2011, CBP officers confiscated Plaintiff's birth certificate and  
 12 Social Security card and removed him to Mexico. CBP officers gave Plaintiff a Notice  
 13 to Appear which did not indicate a date or time for Plaintiff to appear for immigration  
 14 proceedings. The officers instructed Plaintiff to call the immigration court system  
 15 hotline to learn when his hearing would take place. Plaintiff diligently called the  
 16 automated hotline twice a week for two years, but the response remained the same:  
 17 either the case was not filed with the court or there is no match for the "Alien Number"  
 18 that is listed on the Notice to Appear. *Id.* ¶ 23.

19 Plaintiff visited the Calexico West Port of Entry on several occasions, explaining  
 20 that he is a U.S. citizen and asking when he would have his hearing in front of an  
 21 Immigration Judge. Each time, a CBP officer told Plaintiff that "his hearing would be  
 22 scheduled and all he could do is wait." *Id.* ¶ 24.

23 Through an immigration attorney, Plaintiff submitted an N-600 Application for  
 24 Certificate of Citizenship. The immigration attorney incorrectly advised Plaintiff that  
 25 he could receive a determination of his citizenship claim in an N-600 hearing. Plaintiff  
 26 does not know whether the government ever reached a final disposition regarding his  
 27 N-600 application. Plaintiff received notice that an interview on his N-600 application  
 28 had been scheduled for March 6, 2013. *Id.* ¶¶ 27-28.

1       On February 8, 2013, Plaintiff sought parole at the Calexico West Port of Entry  
2 in order to attend the interview. CBP officers Lopez and Felix did not allow Plaintiff  
3 to enter the United States, preventing him from attending the interview. The officers  
4 informed Plaintiff for the first time that “a removal order had been ‘internally’ issued  
5 against him, but that he would not be provided a copy of the order or [] be allowed to  
6 view it.” *Id.* ¶ 28.

7       Plaintiff last visited the Calexico West Port of Entry on or around February 26,  
8 2013. Plaintiff explained that he is a U.S. citizen and asked CBP officers when he  
9 would have a hearing in front of a judge and how he could obtain a copy of any removal  
10 order issued against him. “CBP Officer Frank Hernandez told [Plaintiff] that if he  
11 returned to the Port of Entry, CBP officers would interpret his presence there as an  
12 attempt to gain admission” and that he “would be arrested, detained for a period of time  
13 that would ‘not be brief,’ and removed without seeing a judge.” *Id.* ¶ 29. “[Plaintiff]  
14 has never been permitted to view a copy of the purported order of removal that was  
15 allegedly entered against him.” *Id.* ¶ 30. “[Plaintiff] has never been informed of any  
16 date, time, or place to appear for any hearing before an immigration judge.” *Id.* “CBP  
17 Defendants have failed to refer [Plaintiff’s] matter to an immigration judge as required  
18 by law.” *Id.*

19       Although government officials have never allowed Plaintiff to view the purported  
20 removal order that was allegedly issued against him, CBP officers may have executed  
21 an “Expedited Removal” order against him. If so, that order violated regulations that  
22 mandate a claimed status review hearing before an immigration judge for any person  
23 asserting U.S. citizenship. *Id.* ¶ 32.

24       In addition to the Writ of Habeas Corpus, the Complaint for declaratory and  
25 injunctive relief alleges four claims against all Defendants in their official capacities:  
26 (1) violation of Plaintiff’s right to return to the United States pursuant to the Fifth and  
27 Fourteenth Amendments and the Non-Detention Act by illegally, arbitrarily, and  
28 capriciously determining Plaintiff is not a U.S. citizen and/or removing him to Mexico;

1 (2) violation of Plaintiff's right against unlawful detention pursuant to the Fifth and  
 2 Fourteenth Amendments and the Non-Detention Act by illegally, arbitrarily, and  
 3 capriciously determining Plaintiff is not a U.S. citizen and asserting the right to detain  
 4 him; (3) violation of the Fifth Amendment right to procedural due process by illegally,  
 5 arbitrarily, and capriciously determining Plaintiff is not a U.S. citizen and/or removing  
 6 Plaintiff from the United States without such judicial determination of his claim to U.S.  
 7 citizenship; and (4) violation of the Fifth Amendment right to substantive due process  
 8 by illegally, arbitrarily, and capriciously determining Plaintiff is not a U.S. citizen  
 9 and/or removing him to Mexico and by pressuring his mother to make a false statement  
 10 about his birth. (ECF No. 1 at 18-20).

11 Plaintiff's Complaint requests that the Court: (1) grant the order to show cause  
 12 requested in the application filed with the Complaint; (2) issue a writ of habeas corpus  
 13 ordering Defendants to allow Plaintiff to enter the United States without detaining him;  
 14 (3) declare the Plaintiff is a U.S. citizen; (4) declare that any order directing or  
 15 authorizing Plaintiff's removal from the United States was entered in violation of the  
 16 Due Process Clause of the Fifth Amendment and/or other applicable law and is therefor  
 17 null and void; (5) enjoin Defendants and their officers, agents, servants, employees,  
 18 attorneys, and/or successors from prohibiting Plaintiff from entering the United States  
 19 and/or detaining him at or after such entry; (6) grant reasonable attorneys' fees, costs,  
 20 and other disbursements pursuant to the Equal Access to Justice Act, 28 U.S.C. section  
 21 2412; and (7) grant such other relief as the Court deems just and equitable. *Id.* at 20-21.

## 22 ANALYSIS

### 23 I. Motion to Dismiss for lack of Subject Matter Jurisdiction

24 A motion pursuant to Federal Rule of Civil Procedure 12(b)(1) asserts a lack of  
 25 subject-matter jurisdiction over the dispute, and may be either a facial attack on the  
 26 sufficiency of the pleadings or a factual attack on the basis for a court's jurisdiction.  
 27 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In determining the presence or  
 28 absence of federal jurisdiction, the court applies the “well-pleaded complaint rule,”

1 which provides that federal jurisdiction exists only when a federal question is presented  
 2 on the face of the plaintiff's properly pleaded complaint." *Cal. ex rel. Lockyer v.*  
 3 *Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (quoting *Caterpillar Inc. v. Williams*,  
 4 482 U.S. 386, 392 (1987)). When assessing subject-matter jurisdiction, the court  
 5 assumes the truth of all allegations in the complaint. *See Castaneda v. United States*,  
 6 546 F.3d 682, 684 n.1 (9th Cir. 2008).

7 **Contentions of Parties**

8 Defendants, sued in their official capacity, contend that the Complaint should be  
 9 dismissed for lack of subject matter jurisdiction because Plaintiff has not alleged facts  
 10 to support a waiver of sovereign immunity. Defendants contend that Plaintiff has  
 11 invoked general subject matter jurisdiction pursuant to 28 U.S.C. section 1331, but  
 12 Section 1331 does not provide a waiver of sovereign immunity. Defendants contend  
 13 that a waiver of sovereign immunity for Plaintiff's claims that CBP officers acted  
 14 unconstitutionally must be found in Title 8, not Title 5, of the United States Code.  
 15 Defendants further contend that the complaint against the government must be  
 16 dismissed unless it sets forth statutes waiving sovereign immunity.

17 Plaintiff contends that he has properly invoked federal question jurisdiction under  
 18 28 U.S.C. section 1331 to plead claims for declaratory and injunctive relief for the  
 19 violations of his constitutional rights by government officials. Plaintiff contends that  
 20 5 U.S.C. section 702 expressly waives "sovereign immunity in non-statutory review  
 21 actions for nonmonetary relief brought under 28 U.S.C. § 1331." (ECF No. 31 at 4).  
 22 Plaintiff contends that CBP or its predecessor agencies are subject to injunctive relief  
 23 for violating constitutional rights and directly refutes Defendants' position that Plaintiff  
 24 must invoke a waiver of sovereign immunity found in Title 8. Plaintiff further contends  
 25 that cases cited by Defendants concern the substantive question of whether the  
 26 government had, in fact, waived sovereign immunity over the claims in question and  
 27 do not require Plaintiff to cite the statute waiving sovereign immunity in the Complaint.

28 **Sovereign Immunity**

1       The United States, as a sovereign, is immune from suit. *United States v. Mitchell*,  
 2 445 U.S. 535, 538 (1980). “It is axiomatic that Congressional waiver of sovereign  
 3 immunity is a prerequisite to any suit brought against the United States.” *Roberts v.*  
 4 *United States*, 498 F.2d 520, 525 (9th Cir. 1974). The United States “may not be sued  
 5 without its consent and the terms of such consent define the court’s jurisdiction.” *Baker*  
 6 *v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). A waiver of sovereign immunity  
 7 in any statute “will be strictly construed, in terms of its scope, in favor of the  
 8 sovereign.” *Lane v. Pena*, 518 U.S. 187, 192 (1996). “A party bringing a cause of  
 9 action against the federal government bears the burden of showing an unequivocal  
 10 waiver of immunity.” *Baker*, 817 F.2d at 562. “Unless sovereign immunity has been  
 11 waived or does not apply, it bars equitable as well as legal remedies against the United  
 12 States.” *Beller v. Middendorf*, 632 F.2d 788, 796 (9th Cir. 1980) (citing *Jaffee v. United*  
 13 *States*, 592 F.2d 712, 717 n.10 (3d Cir. 1979)).

14       28 U.S.C. section 1331 does not waive the government’s sovereign immunity for  
 15 claims against government officials sued in their official capacity. *Hughes v. United*  
 16 *States*, 953 F.2d 531, 539 n.5 (9th Cir. 1992). However, “Section 702 waives the  
 17 government’s sovereign immunity, and thus permits the exercise of jurisdiction, in  
 18 actions seeking non-monetary relief with respect to agency action.” *Id.* at 537. Section  
 19 702 provides:

20       A person suffering legal wrong because of agency action, or adversely  
 21 affected or aggrieved by agency action within the meaning of a relevant  
 22 statute, is entitled to judicial review thereof. An action in a court of the  
 23 United States seeking relief other than money damages and stating a claim  
 24 that an agency or an officer or employee thereof acted or failed to act in an  
 25 official capacity or under color of legal authority shall not be dismissed  
 26 nor relief therein be denied on the ground that it is against the United  
 27 States or that the United States is an indispensable party. The United  
 28 States may be named as a defendant in any such action, and a judgment or  
 decree may be entered against the United States: *Provided*, That any  
 mandatory or injunctive decree shall specify the Federal officer or officers  
 (by name or by title), and their successors in office, personally responsible  
 for compliance. Nothing herein (1) affects other limitations on judicial  
 review or the power or duty of the court to dismiss any action or deny  
 relief on any other appropriate legal or equitable ground; or (2) confers  
 authority to grant relief if any other statute that grants consent to suit  
 expressly or impliedly forbids the relief which is sought.

1 5 U.S.C. § 702.

2 In *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), Plaintiff sued the Secretary  
 3 of U.S. Navy in his official capacity. The United States Court of Appeals for the Ninth  
 4 Circuit examined the scope of a waiver of sovereign immunity under section 702. The  
 5 Court of Appeals stated:

6 In *Glines v. Wade*, 586 F.2d 675 (9th Cir. 1978) ... plaintiff Glines, a  
 7 Captain in the Air Force Reserves on active duty, violated a regulation  
 8 requiring him to obtain approval from his commander before circulating  
 9 petitions on Air Force bases. As a result of his unauthorized activities,  
 10 Glines was removed from active duty and reassigned to the standby  
 11 reserves, with adverse financial consequences. This court concluded the  
 12 regulations violated Glines' first amendment rights. It then held that "the  
 13 district court was correct in declaring the regulations void, enjoining their  
 14 enforcement, and ordering Glines reinstated in a status that is consistent  
 15 with his status before he was relieved from active duty." 586 F.2d at 681.  
 16 The [C]ourt held that sovereign immunity did not bar the district court  
 17 from awarding this nonmonetary relief:

18 (In) actions claiming that a government official acted in  
 19 violation of the Constitution or of a statutory authority ...  
 20 Congress has either waived sovereign immunity or the  
 21 doctrine does not apply. 5 U.S.C. [§] 702; *Larson v.*  
*Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-  
 22 91 (1949); *Hill v. United States*, 571 F.2d 1098, 1102 (9th  
 23 Cir. 1978).

24 ...

25 We construe the decisions in *Glines* and *Hill* as holding that section 702  
 26 waives sovereign immunity for [the] action brought under 28 U.S.C. §  
 27 1331 seeking nonmonetary relief for violation of [Plaintiff's] Fifth  
 28 Amendment rights. We recognize the division of authority on the question  
 whether and under what circumstances section 702 waives sovereign  
 immunity in actions brought under 28 U.S.C. [§] 1331.

29 ...we think [*Glines*] states the controlling law of this circuit. We therefore  
 30 affirm the district court's determination that it had jurisdiction over  
 31 [Plaintiff's] claims for nonmonetary relief under 28 U.S.C. [§] 1331.

32 *Beller*, 632 F.2d at 796-97.

33 The Court of Appeals addressed the waiver of sovereign immunity under Section  
 34 702 again in *Presbyterian Church v. U.S.*, 870 F.2d 518 (9th Cir. 1989). The Court of  
 35 Appeals stated: "[Section] 702 of the [APA], 5 U.S.C. § 702 ... waives sovereign  
 36 immunity for the churches' claims for relief [against the United States, the Department  
 37 of Justice, and the INS] other than money damages." *Presbyterian Church*, 870 F.2d  
 38 at 523-24. "The clear objective of the 1976 amendment was to waive sovereign

1 immunity as a defense in actions seeking relief other than money damages. Congress  
 2 was quite explicit about its goals of eliminating sovereign immunity as an obstacle in  
 3 securing judicial review of the federal official conduct.” *Id.* at 524 (citation omitted).  
 4 The Ninth Circuit concluded: “[O]n its face, the 1976 amendment to § 702 waives  
 5 sovereign immunity in all actions seeking relief from official misconduct except for  
 6 money damages.” *Id.* at 525.

7 **Ruling of Court**

8 In this case, Plaintiff’s Complaint invokes federal question jurisdiction under 28  
 9 U.S.C. section 1331. *See* ECF No. 1. Plaintiff alleges that Defendants are officers or  
 10 employees of the Department of Homeland Security and the Department of State sued  
 11 in their official capacities. *See* ECF No. 1 at 5-6. Plaintiff alleges that Defendants  
 12 violated Plaintiff’s constitutional rights by “pressuring his mother to make a false  
 13 statement about his birth,” “determining Plaintiff is not a U.S. citizen,” and “removing  
 14 Plaintiff from the United States without [a] judicial determination of his claim to U.S.  
 15 citizenship.” *Id.* at 19-20. The Court concludes that 5 U.S.C. section 702 waives  
 16 sovereign immunity for Plaintiff’s action, seeking non-monetary relief from government  
 17 officials allegedly acting in violation of his Constitutional rights. *See Beller*, 632 F.2d  
 18 at 796-97; *Presbyterian Church*, 870 F.2d at 523-25.

19 In *Ardestani v. I.N.S.*, 502 U.S. 129 (1991), the United States Supreme Court held  
 20 that Title 8 “expressly supersedes” the hearing provisions of the APA” because  
 21 “Congress intended the provisions of [Title 8] to supplant the APA in immigration  
 22 proceedings.” In this case, Plaintiff alleges in his Complaint that he does not challenge  
 23 an expedited removal. There is no indication that a deportation proceeding was  
 24 conducted or that an order of expedited removal was issued against Plaintiff. Plaintiff  
 25 alleges that Defendants determined that he was not a U.S. citizen without a “judicial  
 26 determination of his claim to U.S. citizenship.” (ECF No. 1 ¶ 50). Plaintiff alleges that  
 27 each Defendant violated the Fifth and Fourteenth Amendments by “illegally, arbitrarily,  
 28 and capriciously determining Plaintiff is not a U.S. citizen,” “asserting the right to

1 detain him,” and “removing Plaintiff from the United States without such judicial  
 2 determination of his claim to U.S. citizenship.” *See* ECF No. 1 ¶¶ 43, 47, 50, 52. The  
 3 Court finds that Plaintiff’s claims do not require a waiver of sovereign immunity found  
 4 in Title 8 because Plaintiff does not seek review of the merits of a deportation  
 5 proceeding pursuant to 8 U.S.C. section 1225.

6 Finally, the Court finds no authority for Defendant’s contention that this case  
 7 must be dismissed on grounds that Plaintiff has not cited 5 U.S.C. section 702 in his  
 8 Complaint. The language in each case relied upon by Defendants refers to whether  
 9 Congress has waived the sovereign immunity of the government and does not address  
 10 pleading requirements. *See U.S. v. Mitchell*, 445 U.S. 535, 536 (1980) (“This case  
 11 presents the question whether the Indian General Allotment Act of 1887 authorizes the  
 12 award of money damages against the United States”); *Lane v. Pena*, 518 U.S. 187, 192  
 13 (1996) (“waiver of the Federal Government’s sovereign immunity must be  
 14 unequivocally expressed in statutory text.”); *Dep’t of Army v. Blue Fox, Inc.*, 525 U.S.  
 15 255, 261 (1999) (“Such a waiver must also be unequivocally expressed in the statutory  
 16 text.”) (internal citations omitted); *Blue v. Widnall*, 162 F.3d 541, 545 (9th Cir. 1998)  
 17 (“the general judicial review provisions of the APA never confer jurisdiction to review  
 18 federal personnel actions”).

19 Defendants’ Motion to Dismiss (ECF No. 22) is denied.

## 20 **II. SUPPLEMENTAL MOTION TO DISMISS (ECF No. 48)**

### 21 **Subject Matter Jurisdiction Over Plaintiff’s Action Against CBP**

22 Defendants contend that Plaintiff’s constitutional challenges to the expedited  
 23 removal policies and procedures of CBP are limited by 8 U.S.C. section 1252(e)(3) and  
 24 may only be brought in the District of Columbia. Plaintiff contends that he does not  
 25 challenge any expedited removal proceeding or order in this action and section  
 26 1252(e)(3) does not apply.

27 8 U.S.C. section 1252(e)(3) provides:

28 (e) Judicial review of orders under section 1225(b)(1)

1 (3) Challenges on validity of the system  
2 (A) In general

3 Judicial review of determinations under section 1225(b) of this title and its  
4 implementation is available in an action instituted in the United States  
5 District Court for the District of Columbia, but shall be limited to  
determinations of—

6 (i) whether such section, or any regulation issued to implement such  
section, is constitutional; or

7 (ii) whether such a regulation, or a written policy directive, written policy  
8 guideline, or written procedure issued by or under the authority of the  
9 Attorney General to implement such section, is not consistent with  
applicable provisions of this subchapter or is otherwise in violation of law.

10 8 U.S.C. § 1252(e)(3).

11 In this case, the Complaint alleges that:

12 The officers informed [Plaintiff] for the first time that a removal order had  
13 been “internally” issued against him, but that he would not be provided a  
copy of the order or even be allowed to view it.

14 ....

15 [Plaintiff] has never been permitted to view a copy of the purported order  
16 of removal that was allegedly entered against him. He has never been  
17 informed of any date, time, or place to appear for any hearing before an  
immigration judge.... [T]he CBP Defendants have failed to refer  
18 [Plaintiff's] matter to an immigration judge as required by law.

19 ....

20 Although government officials have never allowed [Plaintiff] to view the  
21 purported removal order that was allegedly issued against him, ... , CBP  
22 officers may have executed an "Expedited Removal" order against him.

23 (ECF No. 1 ¶ 28, 30, 32). The Complaint further asserts that:

24 By illegally, arbitrarily, and capriciously determining Plaintiff is not a U.S.  
25 citizen and/or removing Plaintiff from the United States without such  
26 judicial determination of his claim to U.S. citizenship, Defendants  
deprived Plaintiff of his right to due process in violation of the Fifth  
Amendment to the United States Constitution.

27 ....

28 Defendants denied Plaintiff his Fifth Amendment right to substantive due  
process by ... willfully withholding information from him regarding his  
removal.

29 *Id.* ¶ 50, 53.

30 Plaintiff alleges violations of the Fifth and Fourteenth Amendments of the

1 Constitution on the grounds that Defendants determined that he was not a U.S. citizen  
 2 without a “judicial determination of his claim to U.S. citizenship.” (ECF No. 1 ¶ 50).  
 3 There is no allegation that a removal proceeding took place or that an order was issued.  
 4 Plaintiff’s challenge is not subject to 8 U.S.C. section 1252(e)(3) because it is not a  
 5 challenge to the validity of expedited removal proceedings pursuant to section  
 6 1225(b)(1).

7 **Improper Venue for Plaintiff’s Action Against the Secretary of State**

8 Defendants contend that Plaintiff’s action asserting constitutional challenges to  
 9 certain consular policies and procedures should be dismissed for improper venue.  
 10 Defendants contend that the constitutional claims asserted against the Secretary of State  
 11 are separate from the factual allegations and relief sought in the habeas action.  
 12 Defendants contend that this judicial district is not the proper venue for the action  
 13 because neither the CBP Commissioner, R. Gil Kerlikowske, nor the U.S. Secretary of  
 14 State, John Kerry reside in this judicial district, and the policies and procedures being  
 15 challenged did not occur in this judicial district. Defendants contend that the U.S.  
 16 District Court for the District of Columbia is the only proper venue because the official  
 17 residence of the Secretary of State is Washington, D.C., and the Plaintiff resides abroad.

18 Plaintiff contends that he has satisfied the venue statute. Plaintiff contends that  
 19 he may bring a cause of action against additional officers or employees of the United  
 20 States in this district because CBP officers Whitford and Flores reside in this district  
 21 and are appropriately named as custodians of Plaintiff. Plaintiff further contends that  
 22 he satisfies 28 U.S.C. section 1391(e)(1)(B), because a substantial part of the events  
 23 giving rise to his claims occurred here.

24 28 U.S.C. section 1391(e)(1) states in relevant part:

25 A civil action in which a defendant is an officer or employee of the United  
 26 States or any agency thereof acting in his official capacity or under color  
 27 of legal authority, or an agency of the United States, or the United States,  
 28 may, except as otherwise provided by law, be brought in any judicial  
 district in which (A) a defendant in the action resides, (B) a substantial  
 part of the events or omissions giving rise to the claim occurred, or a  
 substantial part of the property that is the subject of the action is situated....

1 28 U.S.C. § 1391(e)(1)(A), (B). The Complaint alleges that the CBP custodians,  
2 Whitford and Flores, reside in this judicial district. The violations alleged against the  
3 Secretary of State arise from the events that gave rise to Plaintiff's claims against the  
4 CBP custodians, Whitford and Flores.

5 **CONCLUSION**

6 IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiff's Complaint  
7 (ECF No. 22) is DENIED and the Ex Parte Supplemental Motion to Dismiss (ECF No.  
8 48) is DENIED.

9 DATED: March 2, 2015

10   
11 **WILLIAM Q. HAYES**  
12 United States District Judge

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